89-1967 (1)

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

HUBERT A. BURNETTE, JR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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MAY 1990

QUESTION PRESENTED

Whether the petitioner was denied due process of law when the military judge failed to provide the petitioner with an urinalysis expert consultant, at government expense, to assist the petitioner in the preparation and presentation of his defense.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	9
Appendix A	1a
Appendix B	9a

TABLE OF AUTHORITIES

Cases:

Ake v. Oklahoma, 471 U.S. 68 (1985)	5, 6, 7, 8
United States v. Mance, 26 M.J. 244 (C.M.A. 1988)	6
United States v. Murphy, 23 M.J. 310 (C.M.A. 1987)	6
United States v. Burnette, 29 M.J. 473 (C.M.A. 1990)	1, 5
United States v. Burnette, ACM 26655 (A.F.C.M.R. 1988)	1, 4

Constitutional, Statutory and Regulatory Authorities:

United States Constitution Amendment V	2
10 U.S.C. § 846	2
10 U.S.C. § 867(h) (Supp. III 1985)	1
28 U.S.C. § 1259(3)	1
Article 112a, U.C.M.J., para 27, M.C.M. 1984)	3
R.C.M. 703(d), M.C.M. (1984)	2, 3, 6

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HUBERT A. BURNETTE, JR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Hubert A. Burnette, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on March 19, 1990.

OPINIONS BELOW

The decision of the United States Air Force Court of Military Review, ACM 26655, was issued on October 6, 1988 and was not published, (Appendix B). The opinion of the United States Court of Military Appeals is reported at 29 M.J. 473 (C.M.A. 1990), (Appendix A).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(h) (Supp. III 1985). The judgment of the Court of Military Appeals was entered on March 19, 1990.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property without due process of law . . .

STATUTORY PROVISIONS INVOLVED

10 U.S.C. § 846, Article 46, Uniform Code of Military Justice:

> Opportunity to obtain witnesses and other evidence. The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

Rule for Courts-Martial 703(d):

> Employment of expert witnesses. When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the

expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

STATEMENT OF THE CASE

The petitioner was tried by general court-martial in November 1987, at Andrews AFB, Maryland and Bolling AFB, DC. Contrary to his plea, he was convicted of two specifications of wrongfully using cocaine, and one specification of possession of cocaine, both in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The petitioner was sentenced to confinement for two years, forfeiture of $200 pay per month for two years, reduction to the grade of airman basic and to be discharged from the Air Force with a bad conduct discharge. The convening authority approved the sentence as adjudged on February 19, 1988.

As to the specifications for use of cocaine, the government's entire case rested upon the results of an urinalysis test and the testimony of the government's expert witness, Dr. Mahmoud Ahmed Elsohly,[1] to interpret the test results. The petitioner donated his sample pursuant to a random inspection.

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[1] Dr. Elsohly is a civilian toxicologist, often hired by the government to testify at courts-martial as to the validity of the urinalysis testing procedures.

Prior to trial, on July 7, 1987, the petitioner requested from the convening authority the employment of Dr. William Manders or Mr. John Whiting as an expert consultant for the defense, at government expense. *See,* R.C.M. 703(d). On August 31, 1987, the convening authority denied this request.

The petitioner renewed his request at trial to employ an expert consultant. The military judge called Dr. Elsohly, the government selected and employed expert, to testify on the motion. On direct-examination, Dr. Elsohly testified he was an expert in forensic toxicology hired by the government to interpret the test results of the urinalysis tests performed in this case. He further testified he was available to consult with the defense and would tell the defense if he discovered any errors in the test. On cross-examination, the defense established Dr. Elsohly had testified more than a dozen times for the prosecution and never for the defense. Additionally, he testified that in a number of other cases when he had testified for the prosecution, there were other expert witnesses who testified for the defense. He agreed other urinalysis experts disagree with his interpretation of the validity of the testing method.

Following Dr. Elsohly's testimony, the military judge denied the defense request for an expert consultant. He said Dr. Elsohly was not hired to represent either party, was not biased and therefore, was an "adequate substitute" under R.C.M. 703.

The Air Force Court of Military Review, the first level of military appellate review, affirmed the petitioner's conviction in a summary opinion and did not specifically address the petitioner's request for an expert consultant at trial. *United States v. Burnette,* ACM 26655 (A.F.C.M.R. 1988) (Appendix B).

The same issue was raised at the United States Court of Military Appeals, the second level of military appellate

review. That Court held Dr. Elsohly would not have been an "adequate substitute" for an independent defense consult. However, they affirmed the petitioner's conviction because they said they were not sympathetic to the defense because the defense had limited its request to specific named individuals and refused to accept any other government resource. *United States v. Burnette,* 29 M.J. 473, 476 (C.M.A. 1990) (Appendix A).

Although in their initial letter to the convening authority, the defense rejected the use of any government expert who worked at the Brooks Laboratory,[2] the prosecution did not proffer, nor did the defense reject other government toxicologists who did not work at the Brooks Lab. The Court of Military Appeals assessment the government had met its burden because the defense had preemptively rejected other government resources is misplaced and not supported by the record.

REASONS FOR GRANTING THE WRIT

This Court "recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversarial process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to raw materials integral to the building of an effective defense." *Ake v. Oklahoma,* 470 U.S. 68, 77 (1985). This is especially true in the military. In order for a court-martial to be fair, an accused must be given the same access to government resources as the prosecutor. The petitioner's Fifth Amendment right to Due Process was violated by the

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[2] The Brooks Laboratory at Brooks AFB, San Antonio, Texas, is where the Air Force sends the majority of its urine specimens collected in the continental United States for urinalysis testing.

military judge denying the petitioner's request for a toxicologist as a defense consultant, at government expense.

According to military rules, as opposed to most state statutes, proof of indigency is not required before requesting the government pay for an expert. R.C.M. 703(d). In the case *sub judice,* the convening authority approved the prosecutor hiring a civilian expert to testify for the government regarding the validity of the results of an urinalysis test. However, the convening authority denied the defense's request for an expert that questions the validity of the results in an urinalysis test. The military judge then supported that denial.

The only evidence the government had against the petitioner, concerning the specifications of use of cocaine, were the results of the urinalysis. There was no testimony anyone saw the petitioner use cocaine. The United States Court of Military Appeals (C.M.A.) has said "[w]e are not persuaded that scientific principles of urinalysis are matters of 'common sense' or of 'knowledge of human nature.' " *United States v. Murphy,* 23 M.J. 310, 311 (C.M.A. 1987); *see also, Ake v. Oklahoma, supra,* at 80-81. Before the results of an urinalysis can be introduced to the trier of fact they require an expert witness must testify to interpret the test results for the fact finder. *Murphy, supra* at 312.

Once the government establishes the chain of custody and has had their expert testify on the urinalysis results, they can rest. They do not need to present any evidence of wrongfulness or disclose under what situation the drug was ingested. That element is provided by the military judge in his instructions. The instruction provides that from a positive urinalysis the members can infer use, and from use they can infer the accused knew of the presence of the substance in his system and the contraband nature of the substance. *United States v. Mance,* 26 M.J. 244 (C.M.A.

1988), *cert. denied,* ____ U.S. ____, 109 S.Ct. 367, 102 L.Ed.2d 356 (1988).

Therefore, it is crucial the petitioner be provided some tools with which to prove his innocence. Without an expert with which to attack the urinalysis results, there is no evidence a petitioner can present which will clear him of the specifications.

Only a toxicologist can attack the validity of an urinalysis. The military judge said the defense could use Dr. Elsohly, the government expert, to question the test.

Common knowledge among military judge advocates is there are several qualified experts that question the validity of the Department of Defense (DOD) urinalysis program, especially when testing for cocaine. Two of these experts are Dr. Whiting and Dr. Manders. They are employed by Toxichem Laboratories, Inc. in Gaithersburg, Maryland. Dr. Whiting was formerly employed by the Armed Forces Institute of Pathology with responsibility for the Air Force drug testing program.

The defense, in its "preliminary showing," requested Dr. Whiting or Dr. Manders as an expert who could help the defense attack the results of the petitioner's urinalysis test as well as the whole DOD urinalysis program. Some of the things they sought to contest were the actual testing procedures used, quality control standards, which cocaine metabolite was being tested for, how the DOD cutoff for positive urinalysis is established and what the margin of error is. The defense was putting the military judge on notice the validity of the urinalysis test was going to be a significant issue at trial and a competent toxicologist was necessary to examine and evaluate the test results and assist in the preparation and presentation of the defense. *See, Ake v. Oklahoma, supra,* at 74 and 83.

In *Ake v. Oklahoma, supra,* the trial court refused to provide the defense with a psychiatrist to evaluate the defend-

ant's mental state at the time of the offense. This Court held, ". . . when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Id.* at 74. "[T]he testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success.' (cite omitted)." *Id.* at 81. "[A] defense may be devastated by the absence of a psychiatrist examination and testimony; with such assistance, the defendant might have a reasonable chance of success." *Id.* at 83.

Petitioner testified he had never knowingly used cocaine. He had no idea how the cocaine was introduced into his system, but he speculated it may have been put in his fruit drink at a Washington, D.C. nightclub where he worked part time. The defense theory of the case was unknowing ingestion.

The only viable defense available to the petitioner was to attack the validity of the urinalysis test. It is impossible to mount a successful, or even credible, attack using the government's expert. The testimony of a defense toxicologist is a virtual necessity if the defense is to have any chance of success. With the testimony of a defense toxicologist the petitioner then has a reasonable chance of success.

If this Court does not hear petitioner's case, hundreds of military accuseds will be tried by courts-martial without the ability to mount a meaningful defense once a positive urinalysis has been reported against them. The law as it stands today is fundamentally unfair because it denies accuseds ". . . access to the raw materials integral to the building of an effective defense." *Id.* at 77.

CONCLUSION

The petitioner submits he has suffered a denial of Due Process. Therefore, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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United States Air Force

Attorneys for Petitioner

MAY 1990

APPENDIX

UNITED STATES COURT OF MILITARY APPEALS

No. 61,180
ACM 26655

UNITED STATES OF AMERICA, APPELLEE

v.

HUBERT A. BURNETTE, JR., STAFF
SERGEANT U.S. AIR FORCE, APPELLANT

March 19, 1990

For Appellant: *Captain Darla G. Orndorff* (argued); *Colonel Richard F. O'Hair* (on brief)

For Appellee: *Captain David G. Nix* (argued); *Colonel Joe R. Lamport, Colonel Robert E. Giovagnoni, Major Kathryn I. Taylor* (on brief); *Major Terry J. Petrie.*

Opinion of the Court

COX, Judge:

Appellant was tried by a general court-martial which included enlisted members at Andrews Air Force Base, Maryland, and Bolling Air Force Base, Washington, D.C. Contrary to his pleas, he was convicted of three specifications involving use (2) and possession of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a.[1] We granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED WHEN HE REQUIRED APPELLANT TO AC-

[1] He was sentenced to a bad-conduct discharge, confinement for 2 years, forfeiture of $100 pay per month for 2 years, and reduction to E-1. The convening authority approved the sentence, and the Court of Military Review affirmed in a short-form opinion.

CEPT THE GOVERNMENT PROCURED FORENSIC TOXICOLOGIST AS HIS OWN REQUESTED EXPERT.

The underlying events of the crimes are not here in issue. Essentially, the Government's evidence was that appellant purchased cocaine from an informant who was accompanied by an undercover law-enforcement agent. The informant had already been apprehended for drug activity and claimed to have previously provided appellant cocaine on approximately twelve occasions. Both the informant and the agent were equipped with sound-recording devices, and tapes of the conversation during the transaction were played for the members. After the buy, other agents tried to apprehend appellant, but he managed to escape in his vehicle. He was later apprehended after attempting to disguise himself in another servicemember's uniform. The cocaine purchased by appellant was later discovered in his unattended vehicle.

Appellant's conviction for use of cocaine came about by virtue of two urinalyses conducted on specimens provided by him. The legality of the seizures of appellant's urine was not litigated at trial and is not in issue here.

In his defense, with respect to the possession specification, appellant contended that he had heard the informant was selling drugs within the unit, and appellant was merely taking it upon himself to investigate. With respect to the use specifications, the defense attacked the chain of custody, both through appellant's testimony and through cross-examination of government witnesses. The defense also attacked the laboratory results through cross-examination of government witnesses.

With respect to the granted issue, military defense counsel prior to trial requested that the convening authority employ experts from a specified civilian laboratory at government expense to assist in the preparation of appellant's defense. In her request, counsel stated that she was not

"capable of interpreting the chromatograms or numerical data contained in the 'litigation package' which will be used as evidence against" appellant. Further, counsel asserted that

> [n]o one from the Brooks Laboratory can offer a safe substitute because no one there is likely to report Brooks Laboratory or University of Utah errors [the laboratories which analyzed appellant's urine specimens]. Further, it creates an appearance of impropriety to have government experts doing critical analysis of evidence for the defense.

The convening authority denied the request.

At trial, civilian defense counsel renewed the request *in limine*. The military judge ascertained that the Government had hired another expert, who was independent of the two laboratories that had tested appellant's specimen. This expert, Dr. Mahmoud Ahmed Elsohly, had reviewed the test procedures of the two laboratories and had himself conducted tests on appellant's specimens. The military judge concluded that the defense could accomplish their aims in having expert assistance in reviewing the test procedures and results by consulting with Dr. Elsohly. Accordingly, the judge directed trial counsel to make Dr. Elsohly available to the defense prior to commencement of trial on the merits. Although the defense persisted in their objection, they indicated they would "meet with him . . . and try to do what we can with it."

Subsequently, still in an Article 39(a), UCMJ, 10 USC § 839, session, Dr. Elsohly was called as a witness, and his qualifications and role in the case were examined. At the conclusion of this testimony, the judge and civilian defense counsel clarified their positions:

> MJ: I find Doctor Elsohly is not here to represent either parties but to analyze the package and provide interpretation of the results thereof and that it appears that Doctor Elsohly can in fact provide the

information which defense was seeking through this request, and in accordance with Rule 703, I rule that Doctor Elsohly is an adequate substitute for the request made by the defense. Since he is here present and we are still awaiting appointment of court members, the defense should have more than adequate time to be able to get with him and put to him any questions they have about the packages; the arithmetic; the mathematics or whatever about the tests reports.

CIV

DC: Your Honor.

MJ: Yes, sir?

CIV

DC: If I may, at least so that I won't be out of order, I would frame it as a motion for reconsideration of your ruling you just made. The reason we wanted an expert witness of our own is this test which is kind of one of the disputed tests, which was the one that came around mid-night after the alleged controlled purchase, the test was positive. *Now we have information supplied to us by the prosecution that the next day and somewhat less than 24 hours later . . . I'm not going to give the exact time, but it's somewhere in here; it might be even less than 20 hours . . . the accused took another test and it was negative. The report comes back negative. Now the thing about this test that came back negative is that maybe there is still some numbers here that indicates cocaine, but it doesn't reach that level where it jumps from negative to positive. It gets kind of close, and we were interested in how this stuff . . . how the body . . . whether this second test impeaches the first test,* which we think was taken in an unreliable manner in that it wasn't sealed and the

initial placed on the seal itself, around the bottle and this type of thing which you have heard about, and this witness just said that in a case that he testified to, that his testimony differed from that of another expert about how these type of figures worked and the time it took for this, so we believe . . .

MJ: Mr. McKay, please understand my ruling. The body of this request is for a consultant and I have made my ruling based on what I have before me thus far and what the issues presently are. It seems that Doctor Elsohly would be a substitute to provide what is requested here. Now at such time you want to make a request for a witness that will testify to certain things, I will entertain that request, but this request is for a consultant, sir. It is not for an expert witness.

CIV

DC: Well, we wanted to consult with somebody other than this person about whether this time of digestion and the next step . . . we might have used him as a witness, but that was our purpose and I wanted to put it on the record.

MJ: This request is for a consultant and I have found that this individual is not biased and he's not predisposed to one side or another. He is here to discuss objective scientific data and when I read the body of this request, Appellant Exhibit V, that's what it's all about. So he is here at your disposal for your use. Please keep me posted . . .

(Emphasis added.)

[1] It is well established that, upon a proper showing of necessity, an accused is entitled to the assitance of an expert to aid in the preparation of his defense. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *United States v. Garries*, 22 MJ 288 (CMA), *cert.*

denied, 479 U.S. 985, 107 S.Ct. 575, 93 L.Ed.2d 578 (1986). *See United States v. Johnson*, 22 USCMA 424, 47 CMR 402 (1973). This does not mean, however, that an accused is entitled to an expert of his own choosing. All that is required is that competent assistance be made available. *Ake v. Oklahoma, supra* 470 U.S. at 83, 105 S.Ct at 1097; *United States v. Toledo*, 25 MJ 270, 276 (CMA 1987).

[2] As to the instant case, we agree that very little, if any, showing of necessity was required to entitle the defense to expert assistance in the interpretation of drug analyses. *See United States v. Murphy*, 23 MJ 310 (CMA 1987). Independent assistance—if desired—should have been provided.[2] The military judge did not err, however, in refusing to order the Government to provide the requested civilian experts.

In retrospect, it is clear that Dr. Elsohly would not have been an adequate substitute for such independent assistance. *United States v. Van Horn*, 26 MJ 434 (CMA 1988). In addition to validating the procedures and conclusions of the test laboratories, Dr. Elsohly himself conducted tests on appellant's urine samples and found they indicated positive for the presence of cocaine metabolite. Thus, notwithstanding his employment as an independent government contractor, Dr. Elsohly was presenting incriminating evidence against appellant on behalf of the prosecution. If there remained a genuine question regarding the test procedures and conclusions, it would hardly be fair to expect the defense to extract its ammunition from one of the very witnesses whose conclusions it was attacking. *Id.*

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[2] Presumably, in a case like this, the litigation packet would be mailed to the defense expert for evaluation, and consultation could occur by telephone. If, thereafter, the defense wanted the expert present at trial, a standard showing of necessity would be required, unless the Government was agreeable to producing the expert.

We do not, however, fault the military judge in his ruling. Not only had the defense limited its request to the named civilian experts; it also had specifically rejected the assistance of *any* government experts on the grounds of alleged bias and the appearance of impropriety. Needless to say, we are not sympathetic with such claims and have long rejected them. *United States v. Johnson, supra* at 427, 47 CMR at 405. As long as the Government was willing to provide competent assistance at government expense—which the defense preemptively rejected—the Government's burden was satisfied. The defense could either accept such assistance or look to its own resources.

Further, the military judge did not cut off the defense entirely in his ruling, but specifically advised counsel to "[p]lease keep me posted." Once it became apparent, during trial on the merits, what the total content of Dr. Elsohly's testimony was, it was incumbent on the defense to renew its request for independent expert assistance—if it was still deemed necessary.

It may be possible to infer from the record why the defense did not seek further assistance. As civilian defense counsel stated prior to trial on the merits, it was his understanding that *two* urine samples were taken from appellant shortly after his apprehension—one of which resulted in a positive finding and the other a negative finding. As the testimony on the merits unraveled, this proved not to be the case.

Rather, from portions of the *one* specimen taken from appellant shortly after his apprehension, two radioimmunoassay tests were run—both of which strongly indicated the presence of cocaine metabolite. On the first test, however, one of the *control* samples was out of range; therefore, the test was rerun. On the second test, all conditions and procedures were appropriate. This second test was the result reported positive by the laboratory. In addition, the

same laboratory later conducted a gas chromatography/mass spectrometry analysis on another portion of appellant's specimen. This test also proved positive, and Dr. Elsohly's independent GC/MS test on still another portion of appellant's sample confirmed these results.

Nothing in the direct or cross-examination of Dr. Elsohly or any other witness indicated the scenario as initially understood by defense counsel. Thus, it appears that the defense's primary reason for wanting independent expertise did not pan out, which may explain why the request was not later renewed. In sum, the military judge did not err in refusing to provide the specified expert assistance to appellant.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge EVERETT concurs.

SULLIVAN, Judge (concurring):

For the reasons noted by Judge Cox, I view the military judge's decision to impose this particular expert on the defense as unjustified. *See United States v. Van Horn*, 26 MJ 434 (CMA 1988). Also, I agree that the defense request itself was likewise unreasonable and that the defense failed to pursue this matter as prudently required by the judge. Accordingly, I find no error *United States v. Davis*, 29 MJ 357 (CMA 1990).

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 26655

UNITED STATES

v.

STAFF SERGEANT HUBERT A. BURNETTE, FR 168-44-5681
UNITED STATES AIR FORCE

October 6, 1988

Sentence adjudged 5 November 1987 by GCM convened at Andrews Air Force Base, Maryland and Bolling Air Force Base, District of Columbia. Military Judge: William T. Snyder.

Approved Sentence: Bad conduct discharge, confinement for two (2) years, forfeiture of one hundred dollars ($100.00) pay per month for two (2) years and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Lieutanent Colonel Patrick C. Seeeney. Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Lieutenant Colonel Morris A. Tanner, Jr. and Lieutanent Colonel Robert J. Webster, USAFR.

Before

HODGSON, FORAY and HOLTE
Appellate Military Judges

DECISION

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error prejudicial to the substantial rights of the accused was committed. Accordingly, the findings of guilty and sentence are

AFFIRMED.

OFFICIAL:

/s/ Laura L. Green
LAURA L. GREEN
Documents Examiner
Court of Military Review